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No. 06-1006

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In The

Supreme Court of the United States

UNIVERSITY OF PHOENIX,

Petitioner,

v.

UNITED STATES EX REL. MARY HENDOW AND JULIE ALBERTSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE CAREER COLLEGE ASSOCIATION IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*[1]

The Career College Association is a voluntary membership organization of over 1,150 private, accredited, postsecondary colleges, universities, schools, and institutes located throughout the United States. These member institutions cover the full range of postsecondary education, from certificate and diploma programs to programs leading to associates, masters, and doctoral degrees. The Career College Association's members, which for the most part are organized as tax-paying entities, enroll nearly 2 million students each year. These students train for employment in over 200 occupational fields and constitute approximately one-half of the technically trained workers who enter the U.S. workforce each year. The vast majority of the Career College Association's member institutions participate in one or more of the federal student financial aid programs, as well as in other federal, state and local education and workforce training programs. The Career College Association and its member institutions have an interest in this matter because the decision below drastically expands the circumstances under which a relator may maintain a False Claims Act action against a postsecondary institution.

SUMMARY OF ARGUMENT

The Court should grant the petition for two reasons. *First*, this case is of exceptional importance to all postsecondary institutions. The Ninth Circuit has held that alleging a false statement made in connection with any condition of eligibility to participate in any federal benefit program, or alleging a knowing course of conduct that

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[1] The Career College Association has submitted letters to this Court evidencing the consent of the parties to the filing of this brief. Pursuant to Supreme Court Rule 37.6, the Career College Association states that no counsel for a party has authored this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members or its counsel, has made any monetary contribution to the preparation or submission of this brief.

violated any condition of eligibility to participate in any such program, states a claim under the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.* The implications of this holding are dire. As construed by the Ninth Circuit, every one of the hundreds of statutory and regulatory provisions applicable to any of the student financial aid programs authorized under Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. § 1070 *et seq.* ("Title IV Programs"), constitutes a condition of eligibility for participation in the Title IV Programs.

Even though this case involves one specific condition of eligibility – the restriction on incentive compensation[2] – this broad holding exposes postsecondary institutions to crushing financial liability under the FCA for *any* knowing violation of *any* Title IV statute or regulation, no matter how minor or technical the violation. The portion of 34 C.F.R. § 668.14 imposing the restriction on incentive compensation quoted by the Ninth Circuit, Pet. App. 15a-16a, also conditions initial and continued participation in the Title IV Programs "upon compliance with . . . any additional conditions specified in the program participation agreement that the Secretary requires the institution to meet." 34 C.F.R. § 668.14(a)(1). The Program Participation Agreement ("PPA") is the form contract every postsecondary institution must execute to participate in the Title IV Programs. Among those additional conditions specified in the PPA is that the institution "will comply with all statutory provisions of or applicable to Title IV of the HEA [and] all applicable regulatory provisions prescribed under that statutory authority. . . ." Pet. App. 29a.

In holding that every one of the literally hundreds of "applicable" statutory and regulatory provisions necessarily

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[2] The term "restriction," rather than "ban" or "prohibition," is used advisedly because in 2002 the Secretary amended 34 C.F.R. § 668.14(b)(22) by, *inter alia*, adding subsections (ii)(A)-(L), which contain a non-exclusive list of "[a]ctivities and arrangements that an institution may carry out without violating the provisions of (b)(22)(i) of this section. . . ." 34 C.F.R. § 668.14(b)(22)(ii).

is a condition of eligibility, the Ninth Circuit has transformed the FCA from its intended purpose "to combat and deter fraud," *United States ex rel. Roby v. Boeing Co.*, 302 F.3d 637, 645 (6th Cir. 2002), into a potentially lethal trap for any postsecondary institution alleged to knowingly be in violation of even one of what the Ninth Circuit broadly defines as conditions of eligibility for participation in the Title IV Programs. Moreover, this particular trap is replete with mandatory double or treble damages and additional monetary penalties. Under the "condition of eligibility" theory, these damages potentially apply to *all* amounts received by a postsecondary institution arising from its participation in the Title IV Programs. Because this potential for draconian FCA liability far exceeds the ability of even the largest school, college, or university to withstand, the Ninth Circuit's holding creates tremendous pressure to expend exorbitant sums to either dispute or settle meritless claims based on a so-called condition of eligibility.

As Petitioner University of Phoenix ("University") has demonstrated, Pet. 10-18, the courts of appeal are irreconcilably split as to whether FCA liability attaches when an alleged false statement is made in connection with a so-called condition of eligibility, rather than a condition of payment. The lack of a uniform interpretation of the reach of FCA liability creates an intolerable state of affairs for the Career College Association's member institutions, which are located throughout the United States and many of which have campuses in multiple jurisdictions. Even worse, those of its members located within circuits that have not addressed this issue do not know what the law requires. Thus, those members are under the same intense pressure to settle as those institutions within the Ninth Circuit, quite independent of the merits of the claim. Review by the Court is therefore warranted.

Second, the Court should grant the petition to provide much needed guidance to the lower courts regarding the interrelationship between a relator's Title IV FCA claims and the well-defined, comprehensive, and mandatory set of administrative procedures the Education Department has

established for the specific purpose of resolving allegations identical to those made by the relators. Currently, the lower courts' rulings lack consistency when faced with a relator's Title IV FCA claims that depend upon issues which defendant postsecondary institutions have a statutory, regulatory, or contractual right to have the Education Department resolve. Some courts (*see, e.g., United States ex rel. Siewick v. Jamieson Sci. and Eng'g, Inc.*, 214 F.3d 1372 (D.C. Cir. 2000)) have held that the viability of the FCA claim is contingent upon the results of the Education Department proceedings, whereas other courts (such as the Ninth Circuit below) have determined that the administrative remedy is irrelevant.

The case below exemplifies the problem. The Education Department conducted a program review of the allegations made by the relators in accordance with the processes provided by statute (20 U.S.C. § 1099c-1) and regulation (34 C.F.R. §§ 668.111-668.124). As Petitioner informed the Court, "that review culminated in a settlement agreement in which [the University] did not admit any liability" and was not required "to repay any of the financial aid received by its students, change any of its practices for compensatory admissions counselors, or discipline any of its employees." Pet. 6.[3] Despite this resolution with the expert agency charged with enforcement of the incentive compensation rules, the Ninth Circuit held that "[t]hese questions of enforcement power are largely academic," Pet. 15a, and deemed the results of the program review and settlement agreement irrelevant to the University's potential FCA liability.

As explained in greater detail below, this Court should review the Ninth Circuit's holding because it (a) intrudes on the statutory responsibility of the Secretary of Education; (b) violates the contract between the Secretary of Education and the University (and every other postsecondary institution participating in the Title IV Programs);

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[3] The Ninth Circuit took judicial notice of the settlement agreement.

and (c) conflicts with the prior well-reasoned decision of the United States Court of Appeals for the District of Columbia Circuit in *United States ex rel. Siewick v. Jamieson Sci. and Eng'g, Inc.*, 214 F.3d 1372.

Accordingly, review by this Court is warranted to address the issues set forth above.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION IS OF EXCEPTIONAL IMPORTANCE BECAUSE IT DRAMATICALLY EXPANDS THE SCOPE OF THE FALSE CLAIMS ACT AND EXPOSES POSTSECONDARY INSTITUTIONS TO CRUSHING FINANCIAL LIABILITY FOR AN ALLEGED VIOLATION OF EVEN MINOR REGULATORY PROVISIONS.

The Ninth Circuit's decision below creates massive and potentially ruinous financial exposure for a vital segment of this Nation's economy. The Ninth Circuit held that a knowing violation of any of the hundreds of statutory and regulatory provisions with which a higher education institution agrees to comply in obtaining access to the Title IV Programs creates FCA liability. In the opinion of the Ninth Circuit, compliance with each of those statutes and regulations is "causally related" to the government's decision to pay Title IV funds, because, in its view, there is no meaningful difference between a condition of eligibility to participate in the Title IV Programs and a condition of payment to receive disbursal of specific Title IV funds. Pet. App. 15a.

The Ninth Circuit's aggressive expansion of the scope of FCA liability contains no limiting principle. In fact, the Ninth Circuit held that "[i]f a false statement is integral to a causal chain leading to payment, it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork." Pet. App. 13a (internal citation and quotation omitted). In other words, in the Ninth Circuit, it is irrelevant which Title IV statute or

regulation is violated because they are all equal – no matter how minor or technical the violation. Indeed, the Ninth Circuit held that "fraud is fraud, regardless of how 'small'." Pet. App. 14a. The disastrous untoward consequences of such a broad pronouncement in the Title IV context requires this Court's review.

The portion of the regulation quoted by the Ninth Circuit which includes the restriction on incentive compensation (34 C.F.R. § 668.14(a)(1), Pet. App. 15a-16a), in fact could not be any broader. The referenced regulation conditions initial and continued participation in the Title IV Programs "upon compliance with [1] the provisions of this part [Part 668 of Title 34, Code of Federal Regulations, 34 C.F.R. §§ 668.1-668.198], [2] the individual program regulations [34 C.F.R. §§ 673.1-690.83], and [3] any additional conditions specified in the program participation agreement that the Secretary requires the institution to meet." 34 C.F.R. § 668.14(a)(1).

Consequently, precisely the same broad FCA liability that the relators alleged in the case below necessarily would attach to a knowing violation of a multitude of regulatory requirements (no matter how perfunctory or minor) incorporated in the same regulation because each meets the Ninth Circuit's definition of a condition of eligibility. The chart below sets forth a few of these requirements:

Regulation	**Requirements**
34 C.F.R. § 668.14(b)(3)	The institution will not request or charge a student a fee to determine the student's eligibility for Title IV financial aid.
34 C.F.R. § 668.14(b)(6)	The institution will comply with the standards of administrative capability set out in 34 C.F.R. § 668.16, which include: • designating "a capable individual to be responsible for administering all" Title IV programs, 34 C.F.R. § 668.16(b)(1);

Regulation	Requirements
	• using "an adequate number of qualified persons to administer" the Title IV programs in which the institution participates, 34 C.F.R. § 668.16(b)(2); and • administering the Title IV Programs "with adequate checks and balances in its system of internal controls," 34 C.F.R. § 668.16(c)(1).
34 C.F.R. § 668.14(b)(7)	The institution will submit reports to the Secretary "at such times and containing such information as the Secretary may reasonably require to carry out the purpose of the Title IV, HEA programs."
34 C.F.R. § 668.14(b)(9)	The institution will comply with the requirements of subpart D, 34 C.F.R. §§ 668.41-668.48, which include publishing and making readily available to students information on: • "all the Federal, State and local, private and institutional" financial aid available to that institution's students, 34 C.F.R. § 668.42(a)(1); • information on estimated transportation costs for students, 34 C.F.R. § 668.43(a)(1)(iv); • information on completion and graduation rates, 34 C.F.R. § 668.45; • an annual security report, 34 C.F.R. § 668.46(b); and • an annual report of crime statistics, 34 C.F.R. § 668.46(c).

Regulation	Requirements
34 C.F.R. § 668.14(b)(19)	The institution "will complete, in a timely manner and to the satisfaction of the Secretary, surveys ... as designated by the Secretary, regarding data on postsecondary institutions."
34 C.F.R. § 668.14(b)(20)	All coeducational institutions with intercollegiate athletic programs attended by students receiving athletically-related student financial aid required to submit annually by July 1 the reports required by 34 C.F.R. § 668.48. These reports require, *inter alia*, the institution to report: • the number of all students who attended during the year prior to the report, categorized by race and gender; • the number of those students who received athletically-based financial aid, categorized by race and gender; • their completion or graduation rates, categorized by race and gender within each sport; • the average completion or graduation rate for the four most recent completing or graduating classes, and • who received athletically-based financial aid categorized by race and gender within each sport.

To take only one of many possible examples, under the holding in the case below (and in *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 916 (7th Cir. 2005), *cert. denied*, 126 S.Ct. 1786 (2006)), an institution's

obligation to file by July 1 the reports regarding athletically-related student financial aid required by 34 C.F.R. §§ 668.14(b)(20) and 668.48(a) is a condition of eligibility. Thus, if a relator alleges that a postsecondary institution executed its PPA on June 1 knowing that these reports would not be filed by July 1, as required by 34 C.F.R. § 668.48(a)(1), and those reports were not filed until August 1 of that year, the postsecondary institution would risk being found in violation of those regulations and 20 U.S.C. §§ 1094(a)(5), (7) and (18).[4] That violation would necessarily render the postsecondary institution liable under the FCA for mandatory damages equal to double or treble ***all of the Title IV aid it disbursed*** plus a mandatory per claim penalty,[5] a sum in the hundreds of millions of dollars for many postsecondary institutions and in the billions for others,[6] and far beyond the capacity of any institution to repay.

Because the Ninth (and Seventh) Circuits view FCA liability through the prism of a "but for" test, this crushing FCA liability is the same whether these reports were filed one day late, one month late or were never filed at all because, under the Ninth Circuit's view, filing by July 1 is

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[4] 20 U.S.C. § 1094(a) provides that "to be an eligible institution . . . an institution . . . shall . . . enter into a program participation agreement with the Secretary." This section further requires that "[t]he agreement shall condition the initial and continuing eligibility of an institution to participate in a program upon compliance with" numerous requirements, including: "(5) The institution will submit reports to the Secretary . . . at such times and containing such information as the Secretary may reasonably require. . . . (7) The institution will comply with the requirements of section 1092 [titled "Institutional and financial assistance information for students"] of this title. . . . (18) The institution will meet the requirements established pursuant to section 1092(g) [titled "Data required"] of this title." 20 U.S.C. § 1094(a).

[5] The statutory penalties are adjusted upward for inflation under the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, § 5, 104 Stat. 891, note following 28 U.S.C. § 2461. The penalty is currently $5,500 to $11,000. 28 C.F.R. § 85.3(a)(9).

[6] The University itself has received over $500,000,000 in Title IV funds annually since at least January 1, 1997. C.A. E.R. 44, ¶ 1.

a condition of eligibility. Furthermore, the Ninth Circuit's decision offers no basis for distinguishing among the above examples and any of the hundreds of other applicable Title IV statutes and regulations. Violation of any one of these requirements could result in liability to a postsecondary institution of more than triple all federal financial aid it disbursed to students.

In fact, this limitless "daisy chain" approach has already been taken one step further by at least one district court, which has classified all of the requirements imposed by third party accrediting agencies as conditions of eligibility that could be used to support an FCA claim. *United States v. Chapman Univ.*, 2006 WL 1562231 (C.D. Cal. May 23, 2006). There, the relators alleged Chapman University ("Chapman") falsely certified compliance with the standards of its accrediting agency when, according to the relators, Chapman did not comply with those standards regarding the number of actual *classroom hours* of instruction. *Id.* at *6. Because one of the requirements of participation in the Title IV Programs is accreditation, the district court held that "but for" the allegedly false statements Chapman University provided to its accrediting agency, "Chapman would not have been granted certain [Title IV] grants and loans." *Id.* at *3 (footnote omitted).[7] Thus, in the district court's view, "[n]o more [wa]s required to state a claim under the FCA" and to survive a motion to dismiss. *Id.*

The common thread among the case below, the Seventh Circuit's holding in *Main,* and the district court's decision in *Chapman University* is that in each the relators alleged that a condition of eligibility had been knowingly violated, and that all federal funds disbursed were accordingly subject to recovery under the FCA. However, the sweeping conclusion that a postsecondary institution – or any other participant in a federal benefits program – was never entitled to any of those benefits if it knowingly

[7] Although not cited in its opinion, 20 U.S.C. § 1094(a)(21) provides that "[t]he institution will meet the requirements established by the Secretary and accrediting agencies or associations. . . ."

violated what the Ninth and Seventh Circuits define as a condition of eligibility is too simplistic an answer to the complex legal issues posed by this case. The holdings of the Ninth and Seventh Circuits impose precisely the same draconian financial consequences without regard to how the expert agency charged with enforcing the regulatory scheme at issue views the alleged violation.

In contrast, the analytical starting point to examine the chain of causation for potential FCA liability in, for example, the Fifth and the Second Circuits is whether the alleged false or fraudulent claim or statement was in connection with a condition of payment. Thus, in a case involving essentially identical allegations to those made in the case below and in *Main,* the Fifth Circuit affirmed the dismissal of the relators' claims in part because the "documents [including the PPA] Relators allege as a basis for [the postsecondary institution's] liability under the False Claims Act do not certify compliance as an express condition to payment." *United States ex rel. Graves v. ITT Educ. Servs., Inc.*, 284 F. Supp. 2d 487 (S.D. Tex. 2003), *aff'd*, 111 Fed. Appx. 296 (5th Cir. 2004), *cert. denied*, 544 U.S. 978 (2005).[8]

The *Graves* court also based its holding on the fact that "[i]n contrast to the [Medicare] regulations at issue in [*United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F. Supp. 2d 1017, 1040 (S.D. Tex. 1998), which expressly prohibited the payment of government funds for services rendered in violation of the physician anti-referral statute], the regulations at issue here do not expressly condition payment or retention of the student loans and grants paid on behalf of students under Title IV, HEA on the submission of certification of compliance with the regulation or statute at issue." *Id.* at 502. *Accord United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 459 F. Supp. 2d 1081, 1086 (D. Kan. 2006) ("A legally

[8] In affirming, the Fifth Circuit stated it was doing so "essentially for the reasons stated in [the district court's] memorandum opinion and order." 111 Fed. Appx. at 297 (footnote omitted).

false certification of compliance with a statute or regulation cannot form a viable FCA cause of action unless payment is *expressly conditioned* on that certification.") (emphasis in the original) (citations omitted).

As the Second Circuit points out, there are specific provisions in the Medicare statute that expressly prohibit payment in certain circumstances, such as "the requirement that the particular item or service be 'reasonable and necessary.'" *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 700 (2d Cir. 2001). However, there are no such provisions in the Higher Education Act. To the contrary, the Secretary of Education "is expressly charged in the statutory scheme with determining eligibility. . . ." *Sistema Universitario Ana G. Mendez v. Riley*, 234 F.3d 772, 779 (1st Cir. 2000).

Thus, the foundational presumption in the case below, *Main*, and *Chapman University* that a postsecondary institution's eligibility to participate in the Title IV Programs is automatically forfeited by a knowing violation of a condition of eligibility is simply wrong. In fact, the Secretary's discretion is explicitly prescribed in 34 C.F.R. § 600.41(a): "If the Secretary believes that a previously designated eligible institution as a whole, or at one or more of its locations, *does not satisfy* the statutory or regulatory requirements that define that institution as an eligible institution, the Secretary *may*" (emphasis added) take one or more of the various administrative actions against the institution delineated there.[9] And where a civil penalty is to be imposed, the Higher Education Act is explicit in *requiring* the Secretary to take into consideration "the appropriateness of the penalty to the size of the institution of higher education subject to the determination, and the gravity of

[9] This regulation has the force and effect of law and hence is "binding on courts in a manner akin to statutes." *Chrysler Corp. v. Brown*, 441 U.S. 281, 308 (1979).

the violation, failure, or misrepresentation" in setting the amount of such penalty. 20 U.S.C. § 1094(c)(3)(B)(ii).[10]

Furthermore, even when the Secretary has determined that an institution as a whole or an entire program was not eligible, the Secretary has broad discretion regarding what action, if any, to take. *See, e.g., In re Beth Jacob Hebrew Teachers Coll.*, Dkt. No. 96-77-SP, Decision of the Secretary (Oct. 13, 1998) (Secretary held that "in accordance with my discretionary authority" college would not be required to pay back any Title IV funds disbursed to students in an ineligible program);[11] *In re Mary Holmes Coll.*, Dkt. No. 94-32-SP, U.S. Dep't of Educ. (March 30, 1995), Certified as Final Decision by the Secretary (Sept. 18, 1995) (When violation of Title IV is deemed only technical in nature, the extreme remedy of declaring the program to be ineligible is unwarranted, absent other aggravating circumstances);[12] *In re French Fashion Acad.*, Dkt. No. 89-12-S Decision of the Secretary, 1990 WL 357908 (ED. O.H.A. March 30, 1998) (School not required to pay back Title IV funds during period its state license was expired when State's subsequent renewal was retroactive);[13] *In re Baytown Technical Sch., Inc.*, Dkt. No. 91-40-SP, Decision of the Secretary, 1994 WL 907417, *3 (ED. O.H.A. April 12, 1994) (School not required to pay back Title IV funds during period certain programs and locations were

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[10] The maximum civil penalty, currently up to $27,500 per violation, 34 C.F.R. § 668.84(a), is adjusted in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, § 5, 104 Stat. 891, note following 28 U.S.C. § 2461.

[11] United States Department of Education Decision, http://www.ed-oha.org/secretarycases/1996-77-SP2.pdf (last visited March 21, 2007).

[12] United States Department of Education Decision, http://www.ed-oha.org/cases/1994-32-sp.html (last visited March 21, 2007).

[13] 20 U.S.C. § 1094(a)(21) provides that "[t]he institution . . . will provide evidence to the Secretary that the institution has the authority to operate within a State."

not accredited when accreditation was subsequently granted retroactively).[14]

Had any of these postsecondary institutions been the subject of an FCA claim in the Ninth or Seventh Circuits, the resulting liability would have bankrupted every one of them, because the Ninth and Seventh Circuits presume that the Higher Education Act explicitly conditions payment of Title IV funds on compliance with all of the requirements of the PPA. However, that presumption ignores the broad discretionary authority Congress has vested in the Secretary and also contravenes the law, which *obligates* the Secretary to fashion a remedy commensurate with the nature of both the violation and the institution. The massive expansion of FCA liability resulting from that erroneous presumption is so destructive that review by this Court is required.

II. THE PETITION SHOULD BE GRANTED TO PROVIDE GUIDANCE TO THE LOWER COURTS RESPECTING THE INTERRELATIONSHIP BETWEEN A RELATOR'S FALSE CLAIMS ACT CLAIMS AND AN AGENCY'S ADMINISTRATIVE PROCEDURES FOR ADDRESSING REGULATORY VIOLATIONS.

This Court should also grant the petition to provide much needed guidance to the lower courts respecting the interrelationship between a relator's Title IV FCA claims and the well-defined, comprehensive, and mandatory set of administrative procedures the Education Department has established for the specific purpose of resolving allegations identical to those made by the relators.

In holding that the enforcement powers of the Secretary of Education are "largely academic" in an FCA case, Pet. App. 15a, the Ninth Circuit has ignored the expert agency's well-defined, comprehensive, and mandatory administrative mechanism. Accordingly, this Court should

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[14] *See* note 7, *infra*.

review this holding because it (a) intrudes on the statutory responsibility of the Secretary of Education; (b) violates the contract between the Secretary of Education and the University (and every other postsecondary institution participating in the Title IV Programs); and (c) conflicts with the decision of the United States Court of Appeals for the District of Columbia in *Siewick*.

To provide context, it is appropriate first to describe the Secretary's enforcement powers. Congress has vested the Secretary of Education with broad enforcement powers that can be invoked immediately,[15] prospectively,[16] and retrospectively.[17] The Secretary also has the power to assess civil penalties of up to $27,500 for each violation of any of the various statutory and regulatory requirements of the Title IV Programs. *See* 20 U.S.C. § 1094(c)(3)(B); 34 C.F.R. § 668.84(a).[18]

Each of the Secretary's enforcement powers includes detailed provisions for substantive and procedural due process. 34 C.F.R. §§ 668.81-668.123. Moreover, by its terms, the PPA can only be terminated by the Secretary in accordance with the procedures set out in 34 C.F.R. §§ 668.81-668.98. Pet. App. 38a and 34 C.F.R. § 668.14(f)(1).

The role of the Secretary in overseeing all of the Title IV Programs was aptly described in an administrative decision, *In re Fundacion Educativa Ana G. Mendez*, Dkt. No. 94-30-SA, U.S. Dept. of Educ., Decision upon Remand

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[15] *See* 20 U.S.C. § 1094(c)(1)(G) (emergency actions halting all Title IV payments).

[16] *See* 20 U.S.C. § 1094(c)(1)(F) (limitations, suspensions and terminations of participation in Title IV Programs).

[17] *See* 20 U.S.C. § 1099c-1 (program reviews conducted by the U.S. Department of Education of a higher education institution's compliance with the various statutory and regulatory requirements of the Title IV Programs) and 20 U.S.C. § 1094(c)(1)(A) (annual compliance audits prepared by independent auditors detailing each higher education institution's compliance with the various statutory and regulatory requirements of the Title IV Programs).

[18] *See* note 10, *infra*.

(July 16, 1998), Certified as Final Decision by the Secretary (February 18, 1999), *aff'd, Sistema Universitario Ana G. Mendez v. Riley*, 234 F.3d 772 (1st Cir. 2000):

> As part of the federal government's obligation to safeguard federal student financial assistance funds, a tri-partite gatekeeping system has been established. The participants in this gatekeeping function include: accrediting agencies which have been approved by the Secretary to be the judge of the quality of the content of education programs; state licensing bodies which oversee the legal existence of education programs within their respective states; and [the U.S. Department of Education] which has the overall responsibility to scrutinize the compliance with federal law of all Title IV participants. Although accrediting agencies and state licensing bodies are, indeed, independent entities, they do not operate in a vacuum in so far as Title IV issues are concerned – Congress has delegated to the Secretary the final and ultimate authority to determine whether or not compliance with Title IV is achieved. In a previous decision, the Secretary determined that when an accrediting agency failed to comply with Title IV in making an accreditation decision, he could overturn the accreditation decision in so far as it impacted on Title IV. *See generally, In re Webster Career College, Inc.,* Docket No. 91-39-SP, U.S. Dep't of Educ. (Decision of the Secretary, July 23, 1993).

(at 3).[19]

In addition, every PPA grants the institution the right to the administrative processes set out in the Title IV regulations. Indeed, in *San Juan City College v. United States*, 391 F.3d 1357, 1363 (Fed. Cir. 2004), the Federal Circuit held that the government is liable for damages for

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[19] United States Department of Education Decision, http://www.ed-oha.org/cases/1994-30-sa.rem.html (last visited March 21, 2007).

its breach of the PPA, where it cut off Title IV funds to the college without complying with the notice and hearing requirements of 20 U.S.C. § 1094 and 34 C.F.R. §§ 668.81-668.98.

In light of postsecondary institutions' contractual right to these administrative procedures and the Secretary's discretion and expertise in the administration of the Title IV Programs, the correct way to harmonize the enforcement powers of the Secretary with the exclusive right of the Attorney General to prosecute claims under the FCA is presented by the District of Columbia Circuit's decision in *Siewick*. In that FCA case, the District of Columbia Circuit, in balancing the respective regulatory and FCA statutory schemes, concluded that the interests of both could best be harmonized by recognizing the administrative agency's authority to determine whether the contract at issue was void or merely voidable.

The relator's theory in *Siewick* was similar to that presented here: the defendant "knew that the contract" at issue was void or voidable (because the defendant had violated a representation that it had complied "with all applicable law") and thus knew that it was not entitled to be paid. *Id.* at 1376. In rejecting this claim, the District of Columbia Circuit first explained the difference between void contracts ("one under which the promisor has no duty of performance") and voidable contracts ("one under which a party . . . may '*elect*' to avoid any legal obligations"). *Id.* (emphasis in original; citations omitted). After first concluding that the relator's claim was flawed because the FCA required facts "that the speaking party could reasonably classify as true or false," whereas here "there is only legal argumentation and possibility," *id.* at 1378, the District of Columbia Circuit explained that it is the agency's prerogative to declare contracts invalid, not that of *qui tam* relators:

> [E]ven assuming that [the contractor's] contracts were voidable, invalidity is a distinct issue. [Relator's] theory is concededly and necessarily that [the contactor] knew that the contracts were invalid. But even if voidable they

> would have become invalid only on a contingency – the contingency that the government would exercise the assumed right to disclaim.
>
> [Moreover], a court that found contracts invalid in a *qui tam* action where the government has not joined the plaintiff would have ultimately divested the government of the opportunity to exercise precisely the discretion that is among the key differentiations of voidness from voidability: the discretion to accept or disaffirm the contract on the basis of complex variables reflecting the officials' views of the government's longterm interests.

Id.[20]

Accordingly, this Court should grant review because, contrary to the result in *Siewick*, the "but for" test adopted in the case below (as well as in *Main* and *Chapman University*) improperly disregards the essential role of the Secretary in determining (a) whether a false statement in a condition of eligibility is indeed false and, (b) even if it is, what effect, if any, that falsity will have on the institution's eligibility to receive Title IV funds. Under those courts' "but for" test, the University's PPA is deemed automatically void for purposes of a motion to dismiss if the relators merely allege that the University signed the PPA knowing that it did not intend to comply with one of its provisions. As the *Siewick* court explained:

> The implications of Siewick's position are extraordinary. Disputes arise between the government and its contractors every day. Contractors do not win every penny they claim. On Siewick's theory, any contracting party that misunderstands its legal entitlements and therefore fails to recover on an invoice in full would be liable

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[20] *See also United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 563 (1961) ("This protection [from corrupting influences] can be fully accorded only if contracts which are tainted by a conflict of interest . . . may be disaffirmed by the Government.").

> under the False Claims Act – except in instances where it was unaware of the facts that led to its failure to recover in full. This is not a prescription for fair or efficient contracting.

Id. at 1378.

The Ninth Circuit's own decisions support *Siewick*'s view as to the proper balance necessary when dealing with the respective regulatory and FCA statutory schemes. *See, e.g. United States ex rel. Plumbers & Steamfitters Local Union No. 342 v. Caputo*, 152 F.3d 1060, 1062 (9th Cir. 1998). In that case, the Ninth Circuit held that deferral to the U.S. Department of Labor with respect to whether employees had been misclassified under the Davis-Bacon Act was proper and ordered a stay of the FCA case until the agency ruled.

The agency's regulatory processes also were ordered to be completed ahead of the judicial process in *United States ex rel. Rahman v. Oncology Assoc., P.C.*, 198 F.3d 502 (4th Cir. 1998), which involved FCA claims based on allegations of fraudulent Medicare billing. The Fourth Circuit held that defendant health care provider was entitled under the applicable regulations to a decision in accordance with specific administrative procedures as to whether it had been overpaid and whether reimbursements should be temporarily suspended while the administrative process was ongoing. *Id.* at 512-13. In so holding, the Fourth Circuit rejected the contention made by the United States that "the agency cannot effectively and accurately make the overpayment determinations and that the discovery and fact finding mechanisms provided by the judicial process will assist in that effort." *Id.* at 513. The Fourth Circuit also concluded that accepting the United States' argument would dictate an unacceptable result; namely, having "the outcome of this judicial proceeding provide the basis for the overpayment determination" required by the regulations. *Id.* at 514.

Thus, this Court should grant the petition to provide much needed guidance to the lower courts respecting the interrelationship between a relator's Title IV FCA claims

and the well-defined, comprehensive, and mandatory set of administrative procedures the Education Department has established for the specific purpose of resolving allegations identical to those made by the relators. The need for such guidance in light of the intrusion on the statutory responsibility vested by Congress in the Secretary of Education is particularly acute in this case. After reviewing the relators' allegations, the Secretary of Education and the University entered into a settlement. One aspect of that settlement is that the University's PPA was not voided but, to the contrary, the University continues to participate in the Title IV Programs under its PPA. However, under the Ninth Circuit's holding, not only is that irrelevant, but also if the relators are able to prove at trial that the University knowingly violated a so-called condition of eligibility, the court will void the University's PPA as a matter of law.

CONCLUSION

For the foregoing reasons, the Career College Association endorses the arguments made by Petitioner and urges this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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